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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1984

HARRY H. and ALICE G. KARMUN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVEN C. MOORE
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Attorney for Petitioners
Harry H. and Alice G. Karmun

May 10, 1985

QUESTION PRESENTED

Whether an Alaskan Native's income, directly derived from the sale of reindeer and reindeer products held in federal trusteeship under express provisions of the Reindeer Industry Act of 1937, 25 U.S.C. § 500 et seq., is exempt from federal income taxation by virtue of the trust status of the reindeer and the principles of law and federal policy expressed by this Court in Squire v. Capoeman, 351 U.S. 1 (1956).

PARTIES TO THE PROCEEDING

Petitioners are Harry H. and Alice G. Karmun, Alaska Natives from Deering, Alaska. Respondent is the Commissioner of Internal Revenue, United States Internal Revenue Service.

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioners Harry H. and Alice G. Karmun respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in Karmun v. Commissioner of

Internal Revenue, No. 84-7308, entered on December 12, 1984.

OPINIONS BELOW

The opinion and decision of the United States Tax Court is reported as Karmun v. Commissioner of Internal Revenue, 82 T.C. 18 (1984), and is attached to this petition as Appendix A. The opinion of the Ninth Circuit Court of Appeals is reported as Karmun v. Commissioner of Internal Revenue, 749 F.2d 567 (9th Cir. 1984), and is attached to this petition as Appendix B. The order of the Ninth Circuit Court of Appeals denying Petitioner's petition for rehearing and suggestion of rehearing en banc, dated February 11, 1985, is also attached as part of Appendix B.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was dated and filed on December 12, 1984. A timely petition for rehearing and suggestion of rehearing en banc was filed and denied by the Ninth Circuit Court of Appeals on February 11, 1985. Jurisdiction to review the Court of Appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rules 20 and 29(1) of the Rules of the Supreme Court of the United States.

STATUTE TO BE CONSTRUED

The decision below construed the Reindeer Industry Act of 1937, 25 U.S.C.

§ 500 et seq., which is reprinted in its entirety and attached to this petition as Appendix C.

STATEMENT OF THE CASE

Nature of the Case

The Petitioners, Harry H. and Alice G. Karmun, are Eskimos living on the North Slope of Alaska in the village of Deering. Between 1956 and 1959 Edward Karmun, Harry's uncle, acquired a small herd of 295 reindeer under a loan program created pursuant to the Reindeer Industry Act of 1937, Act of September 1, 1937, 50 Stat. 900, codified at 25 U.S.C. §500, et seq. ("Reindeer Act" or "Act"). Harry Karmun and his father, Alfred, currently own and operate the herd under the partnership "Alfred K. Karmun & Son."

Pursuant to provisions of the Reindeer Act the Secretary of Interior

transferred the reindeer herd to Edward Karmun in trust, retaining legal title in the United States. To this very day the Karmun herd, now numbering approximately 2,000, remains in federal trust status and subject to numerous restrictions enumerated in the Reindeer Act.

For calendar years 1977 and 1978 the Karmuns filed a joint U.S. Individual Income Tax Return (1040A) with the Internal Revenue Service. Petitioner Harry H. Karmun also filed a Partnership Income Tax Return (1065) for those same years for the income earned by the partnership of Alfred K. Karmun & Son.

The Seattle Regional Commissioner of the Internal Revenue Service issued a notice of deficiency on May 26, 1982, for failure of Harry and Alice Karmun to report income in 1977 and 1978 for their share of income from reindeer herding

operations conducted in those years.

On August 17, 1982, the Karmuns filed a petition for redetermination with the United States Tax Court, contending the Commissioner erred in imposing federal income taxes upon income derived directly from the sale of federal trust reindeer and reindeer products. The parties stipulated to various facts, including the trust status of the reindeer. Simultaneous opening briefs were filed on August 19, 1983 and reply briefs were filed on October 3, 1983.

On January 31, 1984, the United States Tax Court entered its decision and opinion refusing to exempt the income and finding deficiencies in the amounts of $1,931.00 and $8,688.83 in the Karmuns' federal income taxes for 1977 and 1978, respectively. Karmun v. Commissioner of Internal Revenue, 82

T.C. 18 (1984). On appeal the Ninth Circuit Court of Appeals affirmed the decision below imposing a federal tax upon said income. Karmun v. Commissioner of Internal Revenue, 749 F.2d 567 (9th Cir. 1984). The Karmuns' petition for rehearing was denied by order of the Ninth Circuit dated February 11, 1985.

Statement of Facts

Domesticated reindeer were first introduced in Alaska from Siberia in 1891 as a missionary effort for Alaska Natives by Reverend Sheldon Jackson.[1/] At this time herds of wild reindeer and caribou had been drastically reduced and other traditional food sources seriously depleted by the influx of Euro-Americans to

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[1/] See Stern, Eskimos, Reindeer and Land, Bulletin 59, Agricultural Experimental Station, University of Alaska (1980), p. 24.

Alaska.

After the initial introduction of reindeer was shown to be a success, Congress made its first appropriation for reindeer in 1893.[2/] Missionary and government programs were sponsored to train Natives to become successful reindeer herders.[3/]

The gold rush on the North Slope in the early part of this century brought an influx of non-Natives, resulting in conflict with the Native population for ownership and control of the reindeer herds. As the gold rush played out, the reindeer market in Alaska began to fail. Congress stepped in to preserve the

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[2/] Case, The Special Relationship of Alaska Natives to the Federal Government, Alaska Native Foundation (1978), p. 74.

[3/] Id.

native character of the industry and provide a means of subsistence for Alaska Natives by consolidating herds in Native ownership through the enactment of the Reindeer Act in 1937.

The Reindeer Act restricted ownership to Natives, provided for government aid and authorized appropriations for the purchase of all reindeer and improvements owned by non-Natives.

Petitioners Harry and Alice Karmun are "natives of Alaska" as that term is used in the Reindeer Act. 25 U.S.C. §500n. Their reindeer herd, one of only twelve to fifteen herds now operating in Alaska, forages on lands near their village on the Seward Peninsula in northwestern Alaska. The herd is grazed on public lands without cost to the Karmuns (or other Native herders) pursuant to grazing permits issued by the Secretary

of Interior. 25 U.S.C. §550m; 43 C.F.R. §4320.2.

The Karmun herd was first acquired between 1956 and 1959 under a series of contracts as part of a loan and "repayment in kind" program instituted by the Bureau of Indian Affairs in 1944.[4/] Each of Edward Karmun's loan program contracts contain language evincing the intent of the United States to establish and maintain a federal trusteeship over the reindeer herd. The contracts further provided that even after the reindeer loans were repaid the reindeer herd would still be held in trust until conveyed by the Alaska Area Director of the Bureau of Indian Affairs to the borrower without restriction.

Full repayment of the loan was made

4/Stern, supra, at pp. 81-2.

in 1961 and the herd was subsequently transferred to Alfred and Harry Karmun. Yet none of the Act's restrictions on sale, transfer, slaughter and inheritance or the herd's federal trust status have ever been removed by the Area Director pursuant to the Act. Significantly, during the forty year period of the federal trusteeship established under the Reindeer Act the Internal Revenue Service has never (until this case) imposed a federal income tax on income directly derived from the Karmun's trust herd or any of the other herds operating in Alaska.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Ninth Circuit Denying A Tax Exemption For Income Directly Derived From Trust Property Raises Important Questions Of Federal Law Relating To The Nature Of The Federal Trust Relationship Which Should Be Reviewed By This Court.

This case gives this Court an opportunity to clarify an important principle of Indian tax law, overlooked by the Ninth Circuit in denying the Karmuns an exemption from federal taxation. That principle, based upon the seminal Indian tax case of Squire v. Capoeman, 351 U.S. 1 (1956), is this: If Indian property is held in trust by the United States, all income derived directly therefrom by the trust beneficiary is exempt from federal income taxation; the express establishment of the trust carries with it a tax exemption during the period of the trust.

The unique historical and political relationship between the United States and Indian tribes forms the backdrop of what has become known as the federal-Indian trust relationship. Announced in Chief Justice John Marshall's decision

in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the federal trust relationship between Indians and the United States was first characterized as "resembl[ing] that of a ward to his guardian." 30 U.S. (5 Pet.) at 17.

The trust principles articulated in Cherokee Nation have been applied in many specific situations to establish and protect the rights of Indian tribes and individual Indians. All federal action toward Indians is construed in light of the trust responsibility. Nowhere is this more evident than in the context of Indian property, where "a fiduciary relationship necessarily arises when the government assumes such elaborate control over forests and property belonging to Indians." United States v. Mitchell, 103 S.Ct. 2961, 2972 (1983).

One of the essential purposes of the

trust relationship over Indian property has always been to assist Indians in achieving independence and self-sufficiency. Thus, for example, the Supreme Court recognized early on that the imposition of state taxation would frustrate if not defeat the purposes of the trust. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867); United States v. Rickert, 188 U.S. 432 (1903). This Court has taken the same view with respect to federal income taxes on income directly derived from trust property. Squire, 351 U.S. at 7-10.

> Unless the proceeds of the timber sale are preserved for respondent he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent.

351 U.S. at 10.

The application of traditional principles of federal income tax law to Indians must likewise be construed in light of the trust relationship. Special laws and policies alter the result when trust property is involved. In "ordinary affairs of life" Indians are subjected to the federal tax laws as any other person. Squire, 351 U.S. at 6. Yet because of the very nature of the federal-Indian trust relationship the taxability of income producing activities associated with trust property -- like those of churches and charitable organizations -- requires a different analysis.

In fact, rather than a presumption of taxability absent an express exemption, just the opposite has consistently been held to be the rule in Indian trust income cases. Accordingly, tax exemp-

tions to Indian trust beneficiaries must be found in such circumstances unless Congress legislates otherwise.

> While in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, . . . the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the government.

Carpenter v. Shaw, 280 U.S. 363, 366-7 (1930); see also Choate v. Trapp, 224 U.S. 665 (1912). Significantly, the express statutory exemption argument has been soundly rejected by this Court in McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174-76 (1973).

The application of traditional canons of statutory construction to Indian laws likewise compels a different analysis. This analysis presumes that Congress, unless it expressly states otherwise, intends by the enactment of laws affecting Indians to be protecting and

fostering Indian rights in harmony with its trust obligation. Bryan v. Itasca County, 426 U.S. 373 (1976); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); see, generally, Cohen, Handbook of Federal Indian Law, 221-225 (1982 ed.).

The decision of the Ninth Circuit in this case clearly violates the fundamental nature and purpose of the trust and the canons of construction applied to federal Indian statutes and treaties, both articulated and relied on in Squire. As in Squire, the Karmun's income in this case was derived directly from the sale of reindeer products and received directly by the primary trust beneficiaries. Until such time as the Secretary of Interior removes the Karmun's herd from trust status the decisions of this Court unequivocally require an exemption from federal

taxation for income directly derived therefrom.

The Ninth Circuit's fundamental mistake was to apply normal principles of federal tax law without according proper weight to the historic federal-Indian trust relationship. This Court should return to the principles adopted in Squire by conferring a tax exemption upon the Karmun's income.

II. The Decision of the Ninth Circuit Requiring An Express Statutory Exemption From Federal Income Taxation For Income Directly Derived From Indian Trust Property Conflicts With This Court's Decision In Squire v. Capoeman.

A. The Reindeer Act Expressly Establishes A Continuing Federal Trusteeship Over Alaskan Native Reindeer Herds.

The primary purpose of the Reindeer Act was to provide a long-term means of subsistence for the Natives of Alaska through the establishment of a self-

sustaining reindeer industry, encouraging and developing native activity and responsibility and thereby preserving its native character. 25 U.S.C. §500. To fulfill its purpose, the Act authorized the Secretary of the Interior to acquire, in the name of the United States for the benefit of the Alaska Natives, by purchase or eminent domain if necessary, reindeer and equipment, and other property. 25 U.S.C. §500a. The ultimate responsibility for the management of the industry was vested in the Secretary. 25 U.S.C. §500f.

Significantly, the Act gave the Secretary the discretionary authority to issue instruments of title or to hold the reindeer in trust for the use and benefit of Native herders.

> The Secretary of the Interior is authorized to distribute the reindeer and other property acquired by the United States

> under this subchapter among the Eskimos or other natives of Alaska, . . . and to execute and deliver appropriate instruments of title, or to hold and use the same in trust for the use and benefit of said natives, with a view of effecting the widest possible distribution of such reindeer and other property among those natives of Alaska who are in need thereof and who can make proper use of the same. (Emphasis added).

25 U.S.C. §500g.

To date the federal trusteeship and associated trust restrictions placed on Alaskan reindeer by the Reindeer Act have not been removed from the Karmun herd. Accordingly, the Reindeer Act prohibits the sale, inheritance or transfer of the Karmun reindeer herd to "anyone other than the said natives of Alaska [or] the United States for and on behalf of said natives" without the express consent of the Secretary. 25 U.S.C. §500i. Sales or other transfers without consent would be null and void

and would not pass title or right of possession. Id.

As in the case of Indian trust land, these restrictions against transfer are classic aspects of the federal-Indian trust relationship.[5/] And, as in the case of trust land, Congress viewed the establishment and continuation of the trusteeship over the Karmun herd and other Native reindeer herds as necessary to foster and enhance Native independence, self-determination and well-being.

> The committee believes the enactment of this bill, although it authorizes an appropriation of $2,000,000, would result in real economy. The Eskimos and Indians are the original inhabitants of Alaska and they are entitled to a fair degree of

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5/ See, e.g., United States v. Clarke, 445 U.S. 253 (1980) (allotments); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) (tribal lands); 25 U.S.C. §410 (trust personalty).

> protection and aid from the Government of the United States. It is the duty of the Government to make proper provision for their social and economic welfare. The passage of this measure should result in the setting up and carrying forward of a self-sustaining Eskimo economy. While the initial investment contemplated by the bill is substantial that investment ought to give ample returns over the years in the economic independence, the physical welfare and the enjoyment of opportunity of the natives of Alaska. It is easy to provide for them now and to make them entirely self-sustaining, but to make such provisions in the future will be more costly and more difficult.

H. Rep. No. 1188, 75th Cong., 1st Sess., p. 3 (1937). See also S. Rep. No. 974, 75th Cong., 1st Sess. (1937).

The federal Indian policy of independence and self-determination within the context of the federal trust relationship has been endorsed by the Reagan Administration and by this Court. See President's Statement on

Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983), cited recently by this Court in Kerr-McGee Corp. v. Navajo Tribe of Indians, No. 84-68, (April 16, 1985), Slip Op. at p. 5.

In sum, like the restrictions on allotments, the specific statutory restrictions placed on the alienation of reindeer have not been removed from Petitioners' herd. These statutory restrictions evince an intent by the federal government to provide a means of self-support which Congress could not have intended to limit or undermine by taxation. The protection of the property right is as important here as it is for the allottee. To preserve this trust and fulfill its purposes, income directly derived from the sale of reindeer and reindeer products must be exempted from federal income taxation.

B. This Court in Squire v. Capoeman Rejected The Standard Used By The Ninth Circuit To Deny The Karmuns A Federal Income Tax Exemption.

This Court in Squire interpreted Sections 5 and 6 of the General Allotment Act of 1887, 25 U.S.C. §§348 and 349, ("GAA"), to imply an exemption from federal capital gains taxation for income derived directly from the sale of standing timber removed from individual allotted land. The result in Squire was deeply rooted in the policies and purposes of the GAA and the canons of construction applicable to federal Indian laws. Squire, 351 U.S. at 6-8.

> The purpose of the allotment system was to protect the Indians' interest and "to prepare the Indians to take their place as independent, qualified members of the modern body politic." [citation omitted]. To this end, it is necessary to preserve the trust and income derived directly therefrom.

Squire, 351 U.S. at 9.[6/]

In discussing the nature of trust property and the basis for exemption from taxation during the period of the trust this Court in Squire quoted with approval from a 1925 U.S. Attorney General's opinion[7/] which reasoned that even without an express statutory basis for exemption

> it was unable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the

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[6/]The Court quoted with approval from Cohen, Handbook of Federal Indian Law 265 (1942), that "it is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom." For a discussion of these issues in the recent revision of the Cohen treatise, see Cohen, Handbook of Federal Indian Law, 391-99 (1982 ed.).

[7/]34 Ops. Atty. Gen. 439, 445 (1925).

> nation; property the management and control of which rests largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian. (Emphasis added.)

Squire, 351 U.S. at 8.

Other courts have followed Squire in inferring a tax exemption for income derived directly from trust property. An example is Big Eagle v. United States, 300 F.2d 765 (Ct. Cl. 1962), where, despite an absence of an express statutory exemption in the Osage allotment act, the court held the income exempt from taxation.

> [T]he spirit of Capoeman . . . holds that the language of the Federal income tax law, broad as it is, does not extend to trust land income of noncompetent Indians even though there is no "definitely expressed" exemption in the tax law.

Big Eagle, 300 F.2d at 771.

The logic of the Supreme Court's analysis in Squire, followed in Big Eagle, is compelling and should be applied here. See Cohen, Handbook of Federal Indian Law 348, n. 63, 425, n. 181, and 758 (1982 ed.) (concluding that proceeds from trust reindeer under the Reindeer Act are non-taxable). Congress intended by the very establishment of the trust to exempt from taxation income "derived directly" from trust property. Restrictions on sale, inheritance and encumbrance serve a common purpose, namely the protection of the property right during the trust period: "bringing [the Indian beneficiary] finally to a state of competency and independence." Squire 351 U.S. at 10. "This chance is encouraged, if not guaranteed, by tax exemption." Big Eagle, 300 F.2d at 771-2.

The Ninth Circuit has previously applied the decision in Squire correctly to exempt income directly derived from an Indian's own trust property from federal taxation. See, e.g., Stevens v. Commissioner of Internal Revenue, 452 F.2d 741 (9th Cir. 1971); and most recently Kirschling v. United States, 746 F.2d 512 (9th Cir. 1984).[8/] And

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[8/] In Kirschling the Ninth Circuit held that a noncompetent Indian's gift of the proceeds from the sale of timber from allotted land to a non-Indian was exempt from a federal gift tax. The court reasoned that through the enactment of the General Allotment Act Congress intended to exempt income derived directly from the allotted land during the period of the trust. Id. at 514-5. And consistent with this Court in Squire, the court interpreted Sections 5 and 6 of the General Allotment Act to imply an exemption from all taxes until issuance of the fee patent. Id. at 514. Because the income in Kirschling was derived directly from trust property, it was held to be entitled to an exemption. The Ninth Circuit's decision in Karmun cannot be squared with its decision in Kirschling.

tax exemptions have been denied by the Ninth Circuit when income was not directly derived from an Indian's own trust property. Fry v. United States, 557 F.2d 646, 649 (9th Cir. 1977), cert. denied, 434 U.S. 1101 (1978); United States v. Anderson, 625 F.2d 910 (9th Cir. 1980), cert. denied, 450 U.S. 920 (1981). Hoptowit v. Commissioner of Internal Revenue, 709 F.2d 564, 566 (9th Cir. 1983).[9/]

Yet in a curious and radical departure from established legal principle the Ninth Circuit denied the Karmuns a federal tax exemption despite

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9/ Courts other than the Ninth Circuit have denied an exemption because the income, while earned on the Indian's own trust land, was not "land-based" or "directly derived." Critzer v. United States, 597 F.2d 708 (Ct. Cl.), cert. denied, 444 U.S. 920 (1979). The Ninth Circuit has cited Critzer with approval. Anderson, 625 F.2d at 913, n. 3.

their income being directly derived from the sale of their own trust reindeer and reindeer products. The decisions in Squire, Stevens and Kirschling support a tax exemption for reindeer income. The decisions in Fry and Anderson are fundamentally distinguishable and cannot be used as the basis to deny an exemption.[8/]

Nonetheless the Ninth Circuit denied an exemption to the Karmuns on the ground that the Reindeer Act failed to explicitly exempt their income from taxation. Karmun, 749 F.2d at 569-70, citing Fry and Anderson.

8/ "What distinguishes Anderson's case from Capoeman is that there the income which was held to be exempt to the allottee was from operations conducted on his own allotted land." Anderson, 625 F.2d at 914 (emphasis in original) citing Fry, 557 F.2d at 648.

The Ninth Circuit has never expressly revealed the origin of the explicit exemption standard. Yet it appears to have been resurrected oddly enough from a Tenth Circuit decision which the Ninth Circuit expressly rejected in 1955 and which this Court rejected in 1956.

This Court granted certiorari in Squire to resolve a conflict between the Ninth Circuit's decision in Squire v. Capoeman, 220 F.2d 349 (9th Cir. 1955) and the Tenth Circuit's decision in Jones v. Taunah, 186 F.2d 445 (10th Cir. 1951). Squire, 351 U.S. at 5.

In Jones the Tenth Circuit had imposed a requirement of an "explicit provision of non-taxability." Jones, 186 F.2d at 448. In Squire the Ninth Circuit expressly rejected the earlier Jones decision, adopting the views of

Chief Judge Phillips (in dissent) in Jones that such a tax would defeat the purpose of the trust. Squire, 220 F.2d at 350. Thus by its affirmance of the Ninth Circuit's decision in Squire this Court has repudiated the explicit exemption standard resurrected in Fry and Anderson.[10/] (It must be noted that Petitioners' take no position on whether the explicit exemption standard from Fry and Anderson can be legitimately applied in cases where income is not directly derived from an Indian's own trust property, only that it is wholly inappropriate to apply here.)

There is no question but that, by

10/As discussed earlier, this Court in McClanahan v. Arizona State Tax Commission, supra, rejected the express statutory exemption requirement in the context of the imposition of state taxation.

this Court's own reasoning, the income at issue in Squire would not meet the Anderson standard. This Court has clearly indicated that the GAA was not "expressly couched in terms of nontaxability". Squire, 351 U.S. at 6. Thus, the implications for allowing the Ninth Circuit to rely on a legally unsupportable legal standard to deny tax exemptions in classic trust income cases should be carefully weighed by this Court in deciding whether to grant certiorari in this case.

Finally, The Ninth Circuit in Karmun has again tortured the application of the canons of statutory construction used in interpreting federal Indian statutes by directing that they be applied only when such a statute first contains express exemptive language. Karmun, 749 F.2d at 569. This

analytical approach first appeared in Fry, 557 F.2d at 649, and later in Anderson, 625 F.2d at 913. The validity of such an approach is highly suspect. The canons of construction are meant to apply in cases of ambiguous statutory language. Where an exemption is express or explicit there is no need to apply them.

The practical effect of the court's approach is to emasculate the canons of construction and the role of federal policy in interpreting Indian law, a proposition entirely rejected by Squire, 351 U.S. at 6-7,[11/] and by Judge

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11/Consistent with Squire, the Eighth Circuit in Holt v. Commissioner of Internal Revenue, 364 F.2d 38 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967) has held that the canons of construction construing statutes in favor of Indians apply to resolve ambiguities in the language of the statute. 364 F.2d at 40. In the context of the Reindeer Act the provisions establishing the trust status of the reindeer (cont.)

Ferguson (in dissent) in Anderson.

> The majority fails to give effect to the reason and logic of the opinion of the Supreme Court in Squire v. Capoeman, 351 U.S. 1, 76 S. Ct. 611, 100 L.Ed. 883 (1956). The Court found in that case that the income which came directly from the land was tax-exempt. It specifically rejected the argument that the case should be viewed as an ordinary tax case without regard to relevant treaties and statutes, congressional policy concerning Indians, or the guardian-ward relationship existing between the United States and Indians.
>
> * * *
>
> The majority fails to recognize that courts must interpret federal statutes and policies in a manner which does not thwart the intent of Congress. The majority's failure to exempt Anderson's income from federal taxation does exactly that. Because I feel that Squire v. Capoeman and federal policies and statutes dictate that Mr. Anderson's income be tax-exempt, I must dissent.

---

11 (cont.)/ herds are sufficient under Holt to trigger the application of the canons.

Anderson, 625 F.2d at 913.

CONCLUSION

The Ninth Circuit's application of the Anderson standard to these facts, requiring an express statutory exemption, radically departs from the fundamental principles of the federal-Indian trust relationship embodied in the Surpeme Court's decision in Squire. Indian trust assets have always been exempt from state and federal tax when (a) the income is received directly by the trust beneficiary and (b) the income is derived directly from the trust assets. No case has held to the contrary. The cases relied upon by the Ninth Circuit to deny an exemption involve attempted extensions beyond the basic rule just set forth; either someone other than the beneficiary was seeking the exemption or the income was

not derived directly from trust assets.

The facts here fit squarely within the basic rule. Reindeer may be unusual trust assets but they have been statutorily designated as trust property and have all the classic incidents thereof. The Karmuns, the intended beneficiaries of the trust, are claiming a tax exemption for income which comes directly from the trust reindeer in the form of sales of reindeer and reindeer products.

With the Reindeer Act, as with the GAA, "unless the proceeds of the . . . sale are preserved for [the Indian trust beneficiary] he cannot go forward when declared competent with the necessary chance of economic survival in competition with others." Squire, 351 U.S. at 10. And, as in Squire, it would simply be wrong -- it would cut too deeply into the historic traditions of the trust --

for the government to turn around and tax the trust property of its own beneficiary: "It is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking. To tax respondents under these circumstances would . . . be 'at the least, a sorry breach of faith with these Indians.'" Id.

For these reasons this Court should grant the petition for certiorari to review the significant implications of the Ninth Circuit's decision and reverse the judgment thereof.

Respectfully submitted,

STEVEN C. MOORE
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Petitioners

by the Department of the Interior suggesting that income from the sale of reindeer is exempt from taxation. 2 Op. Sol. on Indian Affairs 2016 (U.S.D.I. July 2, 1970). The opinion is not controlling. As the Interior opinion itself states, the authoritative determination of federal income tax questions is within the province of the Treasury, not the Interior, Department. Id. at 2017. To give great weight to the opinion in these circumstances would thus be inappropriate.

Finally, appellants argue that the IRS has conceded in Rev. Rul. 67-284, 1967-2 C.B. 55, and in earlier rulings, that income derived from trust property shall be tax exempt. Appellants read more into these rulings than is there. The rulings state that such income will be exempt from taxation only where the

statute in question contains "language indicating clear congressional intent" that the property not be subject to taxation. Id. at 56. As we noted above, the Reindeer Act contains no such express exemptive language. These rulings do not amount to an administrative concession.

For the foregoing reasons, we affirm the judgment of the Tax Court.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRY H. KARMUN and ALICE G. KARMUN,	)	
Petitioners-Appellants,	)	No. 84-7308
v.	)	TAX# 21168-82
COMMISSIONER OF INTERNAL REVENUE,	)	ORDER
Respondent-Appellee.	)	

Before: WRIGHT, SNEED, and ALARCON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX C

REINDEER INDUSTRY ACT OF 1937
25 U.S.C. §500 et seq.

§500. Purpose

A necessity for providing means of subsistence for the Eskimos and other natives of Alaska is hereby declared to exist. It is also declared to be the policy of Congress, and the purpose of this subchapter, to establish and maintain for the said natives of Alaska a self-sustaining economy by acquiring and organizing for and on behalf of said natives a reindeer industry or business, by encouraging and developing native activity and responsibility in all branches of the said industry or business, and by preserving the native character of the said industry or business thus established.

§500a. Acquisition of reindeer and other property

The Secretary of the Interior is hereby authorized and directed, to acquire, in the name of the United States, by purchase or other lawful means, including exercise of the power of eminent domain, for and on behalf of the Eskimos and other natives of Alaska, reindeer, reindeer-range equipment, abattoirs, cold-storage plants, warehouses, and other property, real or personal, the acquisition of which he determines to be necessary to the effectuation of the purposes of this subchapter. Any condemnation proceedings undertaken by virtue of the authority granted in this section shall conform, as nearly as may be, to the procedure provided for the condemnation of real estate by sections 257 and 258 of Title 40, or to that provided by sections 258a to 258e of

Title 40: Provided, That nothing herein contained shall authorize the Secretary of the Interior to consolidate native-owned herds of reindeer with herds owned by others than natives prior to the purchase or acquisition of such herds of others than natives.

§ 500b. Filing claim of title to reindeer by nonnatives

All persons, other than natives of Alaska, who upon September 1, 1937, claim title to any Alaskan reindeer shall, within one year after September 1, 1937, file in Alaska, with the duly authorized agent or agents of the Secretary of the Interior, declarations of their ownership. Similar declarations concerning Alaskan reindeer acquired by any person not a native of Alaska by purchase or by gift at any time after September 1, 1937, shall be filed as aforesaid within thirty days

after the date of such acquisition. Records of all declarations thus filed shall be made and kept open to public inspection in Alaska. If any owner of Alaskan reindeer, to whom the foregoing provisions of this section are applicable, shall fail to file the required declaration within the stated period, he shall be barred thereafter from asserting his claim of title.

§500c. Acceptance of gifts

The Secretary of the Interior is hereby authorized to receive, in the name of the United States, for and on behalf of said natives of Alaska, gifts made for the purposes of this subchapter.

§500d. Acceptance and expenditure of Federal funds

The Secretary of the Interior is hereby authorized to receive and expend, for the purposes of this subchapter, properly authorized loans, grants, or

allocations made to him for said purposes by Federal agencies.

§500e. Revolving fund; moneys not to be covered into Treasury

Except as herein otherwise specially provided, none of the moneys collected or received by the Secretary of the Interior in his administration of this subchapter shall be paid into the Treasury, but all such moneys shall constitute a revolving fund to be administered by the Secretary of the Interior for the purposes of this subchapter.

§500f. Management of industry by Secretary; aim of management

The Secretary of the Interior is authorized and directed to organize and manage the reindeer industry or business provided for by this subchapter in such manner as to establish and maintain for said natives of Alaska a complete and self-sustaining economy and to encourage

and develop the activity and responsibility of said natives in all branches of said industry or business.

§500g. Distribution of reindeer, property, and profits to natives

The Secretary of the Interior is authorized to distribute the reindeer and other property acquired by the United States under this subchapter among the Eskimos or other natives of Alaska, or to corporations, associations, or organizations of said natives, either in the form of gifts or under such conditions as the Secretary of the Interior may prescribe, and to execute and deliver appropriate instruments of title, or to hold and use the same in trust for the use and benefit of said natives, with a view of effecting the widest possible distribution of such reindeer and other property among those natives of Alaska who are in need thereof

and who can make proper use of the same. The Secretary of the Interior may from time to time, in such manner as he determines to be proper for effectuating the purposes of this subchapter, distribute among those of said natives or corporations, associations, or other organizations of said natives, who are engaged in said industry or business or for whose subsistence reindeer are necessary, whatever profits may be earned by that part of the industry or business which is owned by the United States and which may, in the judgment of the Secretary of the Interior, be distributed in accordance with sound business practice.

§500h. Grant of administrative powers to organizations of natives

The Secretary of the Interior is hereby authorized to grant, in his descretion and subject to such terms as he may impose, to any corporations,

associations, or other organizations of said natives any or all of the powers relating to the administration of the reindeer industry or business herein provided for, upon a finding by him as to each grant that it is in the interests of the said natives of Alaska and will serve the purposes of this subchapter.

§500i. Alienation of reindeer or interests; penalty

Live reindeer in Alaska, and the increase thereof, acquired by the Secretary of the Interior pursuant to this subchapter, and live reindeer in Alaska, and the increase thereof, owned by the said natives of Alaska or corporations, associations, or other organization of said natives, however acquired, shall not be sold or transferred, by descent, devise, or in any other manner whatsoever, to anyone other than the said natives of Alaska the United States for

and on behalf of said natives, or corporations, associations, or other organizations of said natives, except with the consent in writing of the Secretary of the Interior or his duly authorized agent, stating that such consent is given upon the condition that the reindeer, and any increase thereof, sold or otherwise transferred with said consent, shall either be butchered in the Territory of Alaska within thirty days or shipped out of said Territory and never brought back alive into said Territory. Sales or other transfers of said reindeer, if made without the consent in writing herein required, or, although made with said consent, if followed by failure to comply with the condition therein required, shall be null and void, and shall not pass any title to or right to possession of any reindeer or increase thereof. No

stock or other interest in any corporation, association, or other organization of said natives, engaged in or organized for the purposes of engaging in the reindeer industry or business, shall be transferred, by descent, devise, or in any other manner whatsoever, to anyone other than said natives of Alaska, the United States for and on behalf of said natives, or corporations, associations, or other organizations of said natives. Any willful violation of the provisions of this section by any vendee or other transferee shall be punishable by a fine of not more than $500: Provided, That no title to any reindeer, or reindeer products, owned by the United States for and on behalf of the said natives of Alaska, nor any title to reindeer, or reindeer products, owned by any of said natives or said corporations, associa-

tions, or other organizations of said natives, nor any stock or other interest in said corporations, associations, or other organizations of said natives, shall be transferred by descent, device or in any other manner whatsoever, except pursuant to regulations promulgated by the Secretary of the Interior for the purposes of preserving the native character of the reindeer industry or business in Alaska and effectuating the other purposes of this subchapter: Provided further, That nothing herein contained shall prevent any native of Alaska who ownes reindeer or any interest therein through stock ownership, or otherwise, in any corporation or association or other organization owning reindeer, from transferring his reindeer, or any interest therein, to his children or other native relatives by gift, sale,

devise, or bequest, or prevent the same from being so transferred or passed by descent.

§500j. "Reindeer" defined

"Reindeer" as used in this subchapter shall be understood to include reindeer and such caribou as have been introduced into animal husbandry or have actually joined reindeer herds, and the increase thereof.

§500k. Rules and regulations

The Secretary of the Interior is hereby authorized to promulgate such rules and regulations as, in his judgement, are necessary to carry into effect the provisions of this subchapter.

§500l. Appointment of natives to administer industry

Whenever, in his judgment, it is practicable and to the best interests of the natives the Secretary shall appoint natives to the supervisory and other

positions in the administration of such reindeer industry or business.

§500m. Use of public lands; violation

In order to coordinate the use of public lands in Alaska for grazing reindeer with the purposes of this subchapter, the Secretary of the Interior is hereby authorized to regulate the grazing of reindeer upon said lands. He may, in his discretion, define reindeer ranges and regulate the use thereof for grazing reindeer; issue grazing permits; regulate and control all round-ups, handlings, markings, and butcherings of reindeer upon said public lands; and may issue rules and regulations to carry into effect the provisions of this section. Any person who willfully violates any of the rules and regulations promulgated for the purpose of carrying into effect the provisions of this section shall be

deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not more than one year or by a fine of not more than $500.

§500n. "Natives of Alaska" defined

The term "natives of Alaska" as used herein shall be deemed to mean the native Indians, Eskimos, and Aleuts of whole or part blood inhabiting Alaska at the time of the Treaty of Cession of Alaska to the United States and their descendants of whole or part blood, together with the Indians and Eskimos who, since the year 1867 and prior to September 1, 1937, have migrated into Alaska from the Dominion of Canada, and their descendants of the whole or part blood.

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FILED
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ALEXANDER L. STEVAS,
CLERK

No. 84-1772

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1984

HARRY H. and ALICE G. KARMUN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVEN C. MOORE
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Attorney for Petitioners
Harry H. and Alice G. Karmun

May 10, 1985

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APPENDIX A

82 T. C. No. 18

UNITED STATES TAX COURT

HARRY H. KARMUN AND ALICE G. KARMUN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 21168-82.

Filed January 30, 1984.

Held: The Reindeer Industry Act of 1937, 25 U.S.C. sec. 500, (1982) does not provide for the exemption from Federal income taxes of Alaskan native reindeer herd operators who operate under the regulation of the Secretary of the Interior; thus, petitioners are taxable on their share of the income of a partnership engaged in the operation of such a herd.

Herbert A. Ross, for the petitioners.

Thomas N. Tomashek and Richard Shipley, for the respondent.

OPINION

FEATHERSTON, Judge: Respondent determined deficiencies in the amounts of $1,931 and $8,688.83 in petitioners' Federal income taxes for 1977 and 1978, respectively. The issue to be decided is whether petitioners, who are natives of Alaska, are exempt from Federal income taxes by the Reindeer Industry Act of 1937, 25 U.S.C. sec. 500, on income earned from the sale of reindeer and reindeer products.

All of the facts are stipulated.

At the time of filing the petition, petitioners resided in Deering, Alaska. For 1977 and 1978, they filed Federal income tax returns with the Internal Revenue Service Center, Ogden, Utah. For the same years, petitioner Harry H. Karmun and his father, Alfred K. Karmun, filed partnership returns for their

partnership named Alfred K. Karmun & Son (the partnership). The income here in dispute was petitioners' distributive share of the partnership's income, all of which was realized from the sale of reindeer and reindeer products during 1977 and 1978.[1/] The reindeer were grazed on public land under grazing permits issued by the Secretary of the Interior (Secretary) pursuant to the Reindeer Industry Act of 1937, 25 U.S.C. sec. 500 (hereinafter the Reindeer Act or the Act).

The partnership's reindeer, referred to as the Karmun herd, numbered approximately 2,000 in 1977 and 1978. The Karmun herd is one of the largest of approximately 12 to 15 Alaskan reindeer

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1/ The notice of deficiency refers to the "production and sale of reindeer meat, horns, and other products."

herds operated under the Reindeer Act.

The Reindeer Act, codified as 25 U.S.C. secs. 500a through 500n, was adopted for the declared purpose, among others, of "providing means of subsistence for the Eskimos and other natives of Alaska."[2/] To this end, the Act authorized the Secretary to acquire,

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[2/]The purpose of the Reindeer Industry Act of 1937 was stated in 25 U.S.C. sec. 500 (1982) as follows:

> A necessity for providing means of subsistence for the Eskimos and other natives of Alaska is hereby declared to exist. It is also declared to be the policy of Congress, and the purpose of this Subchapter [25 USCS secs. 500 et seq.], to establish and maintain for the said natives of Alaska a self-sustaining economy by acquiring and organizing for and on behalf of said natives a reindeer industry or business, by encouraging and developing native activity and responsibility in all branches of the said industry or business, and by preserving the native character of the said industry or business thus established.

if necessary by eminent domain, for and on behalf of the Eskimos and other natives of Alaska, reindeer and other property owned by nonnatives and to use the property so acquired for the management and operation of reindeer herds in Alaska. The Act further authorized the Secretary to distribute, or hold in trust, the reindeer and other property and to organize, manage, and regulate the reindeer industry and the grazing of public lands in such a manner as to establish and maintain for such Alaska natives a self-sustaining business.

It is stipulated that both petitioners are natives of Alaska as that term is used in the Reindeer Act. They contend that the income that they received from the partnership's ownership and operation of the Karmun herd is exempt from Federal income taxes. Respondent

contends that the Reindeer Act does not grant petitioners exemption from Federal income taxes.

Petitioners are correct that natives of Alaska, as defined in the Reindeer Act,[3/] have essentially the same status in relation to the Federal Government as American Indians. The term Indian as used in laws relating to American Indians includes Eskimos, Aleuts, and other

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3/ 25 U.S.C. sec. 500n defines "natives of Alaska" as follows:

> The term "natives of Alaska" as used herein shall be deemed to mean the native Indians, Eskimos, and Aleuts of whole or part blood inhabiting Alaska at the time of the Treaty of Cession of Alaska to the United States and their descendants of whole or part blood, together with the Indians and Eskimos who, since the year 1867 and prior to . . . [Sept. 1, 1937], have migrated into Alaska from the Dominion of Canada, and their descendants of the whole or part blood.

aboriginal tribes insofar as this meaning is suitable to the circumstances of the case. United States v. Native Village of Unalakleet, 188 Ct. Cl. 1, 6-9, 411 F.2d 1255, 1257-1258 (1969); Pence v. Kleppe, 529 F.2d 135, 138, n.5 (9th Cir. 1976). The Federal Government has recognized its responsibility of maintaining a form of guardianship and providing a degree of protection for Alaska natives. Cf. Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918). We must, therefore, follow the principles of the decided cases on the tax status of American Indians in weighing the merits of the parties' arguments.

The courts have recognized that sections 1 and 61 of the Internal Revenue Code of 1954 broadly provide that the income, from whatever source derived, of every individual is subject

to the Federal income tax. The mere fact that an individual is an Indian does not in itself insulate him from taxation. Superintendent v. Commissioner, 295 U.S. 418 (1935). The income of Indians, Eskimos and other natives of Alaska is thus taxable unless an exemption from taxation can be found in the language of a treaty or act of Congress. Commissioner v. Walker, 326 F.2d 261, 263 (9th Cir. 1964), affg. in part and revg. in part 37 T.C. 962 (1964), and cases cited therein; Jourdain v. Commissioner, 71 T.C. 980, 987 (1979), affd. per curiam 617 F.2d 507 (8th Cir. 1980). The "intent to exclude must be definitely expressed." Choteau v. Burnet, 293 U.S. 691, 696 (1931). The Court is not free to create by implication a tax exemption for petitioners. Mescalero Apache Tribe v. Jones, 411

U.S. 145, 156 (1973); Fry v. United States, 557 F.2d 646, 649 (9th Cir. 1977); Jourdain v. Commissioner, supra at 990. We can hold for petitioners only if we can find "express exemptive language in some statute or treaty." United States v. Anderson, 625 F.2d 910, 913 (9th Cir. 1980).

Nothing in the Reindeer Act refers to an exemption from Federal income taxes, and we have not located, nor have petitioners cited, any exemptive language in any other statute or treaty. We must, therefore, hold that petitioners are taxable on their distributive share of the partnership income derived from the operation of the Karmun reindeer herd.

Emphasizing that Eskimos and other natives of Alaska enjoy the same status and are entitled to the same protection as American Indians in the continental

United States, petitioners cite the following provision of 25 U.S.C. sec. 1322(b) as a "statute showing Congressional intent regarding nontaxability":

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community, that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; * * *

This provision is not a part of the Reindeer Act. It is part of a statute (P.L. 90-284, Title IV, Apr. 11, 1968, 82 Stat. 78) defining the jurisdiction to be exercised by State courts over causes of action to which Indians are parties. The provision does not refer to Federal income taxes. It is designed to preserve the existing limits on the power of States, not the United States, to impose taxes on property which belongs

to Indians or Indian tribes, is held in trust by the United States, or is subject to restrictions or alienations imposed by the United States. See Bryan v. Itasca County, 426 U.S. 373 (1976); Eastern Band of Cherokee Indians v. Lynch, 632 F.2d 373 (4th Cir. 1980). The statute, therefore, does not aid petitioners' cause.

Petitioners next argue that, under the provisions of 25 U.S.C. sec. 500i,[4/] which is part of the Reindeer

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4/Sec. 500i. Alienation of reindeer or interests; penalty

> Live reindeer in Alaska, and the increase thereof, acquired by the Secretary of the Interior pursuant to this Act [25 USCS Secs. 500 et seq.], and live reindeer in Alaska, and the increase thereof, owned by the said natives of Alaska * * * however acquired, shall not be sold or transferred, by descent, devise, or in any other manner whatsoever, to anyone (cont.)

Act, reindeer and reindeer products are "restricted property", as that term is used in Indian law, and that, under the principles of Squire v. Capoeman, 351 U.S. 1 (1956), income derived from restricted property is exempt from Federal income taxes. We do not agree.

In Squire v. Capoeman, supra, the

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4 cont./ other than the said natives of Alaska, the United States for and on behalf of said natives, * * * except with the consent in writing of the Secretary of the Interior or his duly authorized agent, stating that such consent is given upon the condition that the reindeer, and any increase thereof, sold or otherwise transferred with said consent, shall either be butchered in the Territory [State] of Alaska within thirty days or shipped out of said Territory [State] and never brought back alive into said Territory [State]. Sales or other transfers of said reindeer, if made without the consent in writing herein required, or, although made with said consent, if followed by failure to comply with the condition therein required, shall be null and void, and shall not pass any title to or right to possession of any reindeer or increase thereof. * * *

United States sought to tax an Indian's capital gain resulting from the severance and sale of timber from land allotted to him under the Indian General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. sec. 331, et seq. (hereinafter the Allotment Act).[5/] The Allotment Act provided that allotted land was to be held in

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5/Under the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, 25 U.S.C. sec. 331, as amended, Indians were to be allotted up to 160 acres of grazing land or 80 acres of agricultural land on their reservations. The land so allotted was to be held in trust by the United States, for the "sole use and benefit" of the Indian allottee, for a period of 25 years (longer in the discretion of the President). At the end of the trust period, the land was to be conveyed to the allottee, "in fee, discharged of said trust and free of all charge or incumbrance whatsoever." See also the Indian Reorganization Act of 1934, ch. 576, sec. 2, 48 Stat. 984, 25 U.S.C. sec. 462, which provides: "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress."

trust by the United States for the "sole use and benefit" of the Indian allottee, subject to a promise to convey the fee interest to the allottee at the end of the trust period "free of all charge or incumbrance whatsoever." 25 U.S.C. sec. 348. Finding a congressional intent in this specific statutory language to exempt allotted land from all taxes until the fee interest was transferred to the allottee (351 U.S. at 8), the Supreme Court held that income derived directly from the land was exempt from tax. The Court went on to say that "[t]he purpose of the allotment system was to protect the Indians' interest and 'to prepare the Indians to take their place as independent, qualified members of the modern body politic'." (351 U.S. at 9); Critzer v. United States, 220 Ct. Cl. 43, 49-50, 597 F.2d 708, 712 (1979). Further noting

the fact that the cutting of the timber had substantially decreased the value of the land, the Supreme Court stated (Squire v. Capoeman, 351 U.S. at 10):

> Unless the proceeds of the timber sale are preserved for respondent [the Indian taxpayer], he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act * * *.

There is no language in the Reindeer Act comparable to the free-of-incumbrance language found in the Allotment Act. Moreover, the whole purpose and concept of the Reindeer Act is different from that of the Allotment Act. The legislative history of the Reindeer Act shows that it was not intended to benefit or promote the welfare of the 12 to 15 Alaskan reindeer herd owners but was intended to provide a reliable food supply for the Eskimos of northwestern

Alaska. H. Rept. No. 1188, 75th Cong., 1st. Sess., Reindeer Industry in Alaska (1937); S. Rept. No. 474, 75th Cong., 1st. Sess., Alaska Reindeer Industry (1937).

These congressional reports state that the coming of the white man to the western and northwestern parts of Alaska brought disaster to the natives' food supply. To save the natives from starvation, 1,280 reindeer were imported from Siberia between 1892 and 1902. These reindeer, the only ruminants able to eke out a living by grazing on the lichens or reindeer moss found in the areas bordering on the Bering Sea and the Arctic Ocean, multiplied rapidly and became the only substantial and assured food supply for the natives. Reindeer became the most important element in Eskimo economy.

By 1937, however, nonnative Alaskans had acquired a third of the reindeer herds, were operating them as commercial ventures, and were depleting the available grazing resources without regard to the welfare of the natives. Conflicts between Eskimo and non-Eskimo owners threatened irreparable damage not only to the reindeer industry but to the entire life and economy of the Eskimos. To deal with this problem, Congress enacted the Reindeer Act authorizing acquisition of the non-Eskimo owned herds and ownership and operation by Alaskan natives of the reindeer industry under the supervision of the Secretary of the Interior.[6/]

[6/] H. Rept. No. 1188, 75th Cong., 1st. Sess., p. 3 (1937), concludes:

> The committee believes the enactment of this bill, (cont.)

As explained in Squire v. Capoeman, supra, the broad purpose of the Allotment Act's land ownership restrictions was to benefit the individual allottees by preparing them for an independent place in society. The purpose of the Reindeer

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6 (cont.)/ although it authorizes an appropriation of $2,000,000, would result in real economy. The Eskimos and Indians are the original inhabitants of Alaska and they are entitled to a fair degree of protection and aid from the Government of the United States. It is the duty of the Government to make proper provision for their social and economic welfare. The passage of this measure should result in the setting up and carrying forward of a self-sustaining Eskimo economy. While the initial investment contemplated by the bill is substantial that investment ought to give ample returns over the years in the economic independence, the physical welfare and the enjoyment of opportunity of the natives of Alaska. It is easy to provide for them now and to make them entirely self-sustaining, but to make such provisions in the future will be more costly and more difficult.

Act, in contrast, was not to benefit the individuals whose reindeer herd ownership rights were restricted, but, rather, to provide a continuing source of food for the Eskimos and other Alaskan natives.[7/] There is nothing in the

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7/ Petitioners have attached to their brief copies of certain memoranda prepared by field officials of the Department of the Interior on the tax status of the reindeer herd owners. These memoranda conclude that the owners are not subject to taxation by the State of Alaska, acknowledge that the Internal Revenue Service has responsibility for interpretation of the Federal income tax laws, and suggest that the reindeer herd operators could argue that, because their herds are restricted property, they are entitled to exemption from Federal income taxes. We do not (cont.)understand that these memoranda, prepared by field officials of the Department of the Interior, necessarily represent that Department's official views. Cf. Stevens v. Commissioner, 452 F.2d 741 (9th Cir. 1971), affg. in part and revg. in part 52 T.C. 330 (1969) and 54 T.C. 351 (1970). In any event, for the reasons stated in the text, we do not think the restricted property argument is sound.

Reindeer Act inconsistent with the imposition of an income tax on the profits realized by the owners and operators from their reindeer herds. Cf. Holt v. Commissioner, 364 F.2d 38 (8th Cir. 1966), affg. 44 T.C. 686 (1966). In the words of Squire v. Capoeman, 351 U.S. at 6, in the absence of some exemption provision, the reindeer herd operators are "subject to the payment of income taxes as are other citizens."

It is no answer to say that the reindeer herd owners and operators could more effectively carry out the objectivesof the Reindeer Act if they were tax exempt.[8/] In United States

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8/Petitioners cite Comment, Indian Taxation: Underlying Policies and Present Problems, 59 Cal. L. Rev. 1261, 1286-1291 (1971), which discusses the need to reconcile two possible (cont.)

v. Anderson, 625 F.2d 910, 917 (9th Cir. 1980), the court of appeals reversed a district court holding that the Federal policies reflected by the Indian Reorganization Act of 1934 of promoting optimal land use of reservations and eventual Indian economic independence precluded the taxation of an Indian's income derived from leasing combined parcels of allottees' lands, stating:

> If federal courts were free to create federal tax exemptions for Indians based on policy alone, the federal policy of Indian economic advancement, implicit in almost all of the many federal enactments regarding Indians, would soon have

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8 (cont.)/conflicting policies: (1) that exceptions to the Internal Revenue Code must be explicit, and (2) that tax-exempt Indian lands should afford maximum economic benefit to their owners. See also Big Eagle v. United States, 156 Ct. Cl. 665, 673-674, 300 F.2d 765, 769 (1962). We recognize the possible conflict. The cases cited in the text, however, permit tax exemption only where authorized by specific legislative language.

> the unintended effect of exempting all Indians from all federal taxation. [Fn. ref. omitted.]

Petitioners are not exempt from Federal income taxation of their profits from the ownership and operation of the Karmun herd.

To reflect the foregoing,

Decision will be entered for the respondent.

UNITED STATES TAX COURT
Washington, D.C. 20217

HARRY H. KARMUN AND ALICE G. KARMUN,	)	
Petitioners,	)	
vs.	)	Docket No. 21168-82.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed January 30, 1984, it is

ORDERED AND DECIDED: There are deficiencies in the amounts of $1,931 and $8,688.83 in petitioners' Federal income taxes for 1977 and 1978, respectively.

C. Moxley Featherston
Judge

Entered: January 30, 1984

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRY H. KARMUN and ALICE G. KARMUN,	)	
Petitioners-Appellants,	)	No. 84-7308
v.	)	TAX# 21168-82
COMMISSIONER OF INTERNAL REVENUE,	)	OPINION
Respondent-Appellee.	)	

Appeal from a Decision of the
United States Tax Court
Argued and Submitted November 9, 1984

Before: WRIGHT, SNEED, and ALARCON,
Circuit Judges.

SNEED, Circuit Judge:

This is an appeal from a judgment of the United States Tax Court finding deficiencies in the amounts of $1,931 and $8,588.83 in appellants' federal income taxes for 1977 and 1978. We affirm the Tax Court's judgment.

I.

FACTS AND PROCEEDINGS BELOW

Taxpayers Harry and Alice Karmun, who are natives of Alaska, filed federal income tax returns for 1977 and 1978 with the Internal Revenue Service Center in Ogden, Utah. For the same years, appellant Harry Karmun and his father, Alfred Karmun, filed partnership returns for their partnership named Alfred K. Karmun & Son (the partnership). The partnership operates a herd of approximately 2,000 reindeer under the provision of the Reindeer Industry Act of 1937, 25 U.S.C. § 500 (1982) (the Reindeer Act or the Act). The reindeer were grazed on public land under grazing permits issued by the Secretary of the Interior pursuant to the Act. The income here in dispute was appellants' distributive share of the partnership's income, all of which was

realized from the sale of reindeer and reindeer products during 1977 and 1978.

The Reindeer Act was adopted in order to provide a "means of subsistence for the Eskimos and other natives of Alaska." 25 U.S.C. § 500 (1982). To this end, the Act authorized the Secretary of the Interior to acquire for the Eskimos reindeer and other property owned by nonnatives. The Act further authorized the Secretary to distribute, or hold in trust, the reindeer and other property and to organize, manage, and regulate the reindeer industry in such a manner as to establish and maintain for such Alaska natives a self-sustaining business. Id.

On their joint federal income tax returns for 1977 and 1978, appellants did not include as income Harry Karmun's distributive share of the partnership

income for those years. On examination of those returns, the Commissioner determined that this share should have been included in gross income for each year, and accordingly, determined income tax deficiencies in the respective amounts of $1,931 and $8,688.83. Appellants thereafter filed a petition with the Tax Court seeking a redetermination of the asserted deficiencies on the ground that the Reindeer Act exempts from taxation income derived from reindeer and reindeer products. The Tax Court rejected that contention. Therefore, the sole question on appeal is whether earnings received by Alaskan natives from the sale of reindeer and reindeer products are exempt from federal income taxation under the Reindeer Act.

II.

DISCUSSION

Appellants make five arguments. First, they contend that, although the Reindeer Act does not expressly exempt from taxation income derived from reindeer and reindeer products, this court ought to imply an exemption on the basis of the purposes and policies of the Act. Second, they argue that, under section 500g of the Reindeer Act, reindeer and reindeer products are "restricted property" as that term is used in Indian law, and that, under the principles of Squire v. Capoeman, 351 U.S. 1 (1956), income derived from restricted property is exempt from federal taxation. Third, they claim that the contracts conveying the reindeer to them from the Government evince an intent to exempt from taxation the income derived from operation of the

herd. Fourth, appellants argue that this court ought to give great weight to an opinion issued by the Department of the Interior suggesting that a tax exemption is appropriate under the Act. Lastly, they argue that the IRS has conceded, through previous revenue rulings, that the income in dispute here is tax exempt. We shall consider each of these arguments in turn.

A. The Requirement of an Explicit Exemption

This circuit has long held that Indians are subject to federal income taxes, as are other citizens, unless an exemption from taxation can be found in the language of a Treaty or Act of Congress. Hoptowit v. Commissioner, 709 F.2d 564, 565 (9th Cir. 1983); United States v. Anderson, 625 F.2d 910, 913 (9th Cir. 1980). cert. denied, 450 U.S. 920, 101 S.Ct. 1367, 67 L.Ed. 2d 347

(1981); Commissioner v. Walker, 326 F.2d 261, 263 (9th Cir. 1964). Notwithstanding the canon of interpretation that resolves ambiguities in statutes and treaties in favor of Indians, we have recognized that the intent to exempt income of Indians from taxation must be clearly expressed. Hoptowit, 709 F.2d at 565; Confederated Tribes of Warm Springs v. Kurtz, 691 F.2d 878, 882 (9th Cir. 1982); Anderson, 625 F.2d at 913. Policy considerations by themselves are insufficient to justify the implication of a tax exemption absent express exemptive language. Anderson, 625 F.2d at 916-17; Fry v. United States, 557 F.2d 646, 649 (9th Cir. 1977), cert. denied, 434 U.S. 1011, 98 S.Ct. 722, 54 L.Ed. 2d 754 (1978).

No clear expression of intent to exempt appears in the Reindeer Act.

Appellants argue, nevertheless, that the Act taken as a whole suggests that Congress intended an exemption. In making this argument, appellants rely principally on Stevens v. Commissioner, 452 F.2d 741 (9th Cir. 1971). They read Stevens to say that this court will imply an exemption, absent express exemptive language, on the basis of the purposes and policies of a statute.

Appellants misread Stevens. In Stevens, this court held that income derived from lands purchased under the Indian Reorganization Act of 1934 (the IRA) is exempt from federal income taxation. The court reasoned that although the IRA itself does not contain express exemptive language, it has to be construed in pari materia with the General Allotment Act of 1887 (the GAA), which does contain such clear language.

Stevens, 452 F.2d at 746; see also Anderson, 625 F.2d at 913 n. 5. Since the Stevens court interpreted the GAA and the IRA to be part of a single statutory scheme, express exemptive language in the GAA provided a basis for implying an exemption under the IRA. Stevens, 452 F.2d at 746. Stevens does not, as appellants contend, stand for the proposition that an exemption will be implied absent express exemptive language.

B. Squire v. Capoeman

In Squire v. Capoeman, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956), the Supreme Court reviewed the imposition of capital gains tax on the sale of timber cut from land allottted under the General Allotment Act of 1887. The GAA provided that allotted land was to be held in trust by the United States for the "sole use and benefit" of the Indian allottee,

subject to a promise to convey the fee interest to the allottee at the end of the trust period "free of all charge or incumbrance whatsoever." 25 U.S.C. § 348 (1982). Finding this "free-from-incumbrance" language to evince a congressional intent to exempt allotted land from all taxes, the Court held that income derived directly from the land was exempt from federal taxation. Squire, 351 U.S. at 8, 76 S.Ct. at 615. No such language appears in the Reindeer Act. Income is tax exempt under Squire only when the governing treaty or statute contains language which can reasonably be construed to confer an exemption. Anderson, 625 F.2d at 913; see also Holt v. Commissioner, 364 F.2d 38, 40 (8th Cir. 1966) (before panel including Blackmun, J.), cert. denied, 386 U.S. 931, 87 S.Ct. 952, 17 L.Ed. 2d 805 (1967).

Therefore, it is not exempt here.

Moreover, as the Tax Court observed, the purpose of the legislation involved here is entirely different from that in Squire. The purpose of the GAA was to benefit the individual allottees by preparing them to become independent citizens. Accordingly, the Squire court found that the tax exemption was crucial to fulfilling this purpose. Squire, 351 U.S. at 9, 76 S.Ct. at 616. By contrast, the purpose of the Reindeer Act is to provide a continuing food source to the Eskimos of north-western Alaska through the establishment of a native-operated reindeer industry. 25 U.S.C. § 500 (1982). That purpose is not undermined by requiring the owners and operators of the reindeer herds to pay federal income taxes on their profits from the successful conduct of such operations.

C. Other Arguments

Appellants' third argument is that the contracts conveying the reindeer to them from the Government evince an intent to exempt from taxation the income at issue here. These contracts were not introduced into evidence before the Tax Court, and are not part of the record on appeal. Normally, an appellate court will not supplement the record on appeal with evidence not reviewed by the lower court. Dickerson v. Alabama, 667 F.2d 1364, 1367 (11th Cir.), cert. denied, 459 U.S. 878, 103 S. Ct. 173, 74 L.Ed. 2d 142 (1982). Even assuming that this court were to consider these contracts, however, they do not clearly indicate that a tax exemption was contemplated by the parties to the contracts.

Appellants also seek to bolster their position by relying on an opinion issued

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No. 84-1772 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1985

HARRY H. KARMUN AND ALICE G. KARMUN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1772

HARRY H. KARMUN AND ALICE G. KARMUN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners seek review of the court of appeals' affirmance of a Tax Court determination that income derived from a reindeer enterprise conducted under the Reindeer Industry Act of 1937, 25 U.S.C. 500 *et seq.*, is not exempt from federal taxation.

1. The Reindeer Industry Act was enacted to promote the welfare of Alaskan natives through the development of a native-operated reindeer herding industry. 25 U.S.C. 500. During 1977 and 1978, Harry Karmun, an Alaskan native,[1] participated as a partner in a reindeer enterprise subject to the Act. The partnership managed a herd of approximately 2,000 reindeer that were grazed on public land through the use of grazing permits issued by the Secretary of the Interior. See 25 U.S.C. 500m.

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[1]The Act defines the term "natives of Alaska" as including Eskimos, Indians, or Aleuts of whole or part blood. 25 U.S.C. 500n.

Petitioners, Harry Karmun and his wife Alice, filed joint federal income tax returns for 1977 and 1978. They failed to include as part of their gross income Harry Karmun's annual distributive share of the partnership's profit from the sale of reindeer and reindeer products. Upon audit, the Commissioner determined that the partnership income should have been included in gross income for each year.

Petitioners sought a redetermination of the resulting tax deficiencies in the Tax Court, arguing that the Reindeer Industry Act exempts from taxation the income of an Alaskan native derived from a reindeer enterprise. The Tax Court sustained the Commissioner's determination, concluding that the Reindeer Industry Act does not provide for such an exemption (Pet. App. 1-23). The court of appeals affirmed (*id.* at 24-37). The court of appeals observed that "Indians are subject to federal income taxes, as are other citizens, unless an exemption from taxation can be found in the language of a Treaty or Act of Congress" (*id.* at 29, citations omitted). It agreed with the Tax Court that neither the language nor the purpose of the Reindeer Industry Act supported petitioners' claim to an exemption from federal tax (*id.* at 29-34).[2]

2. The court of appeals' decision is correct and is consistent with the decisions of this Court and other courts of appeals. Further review is not warranted.

a. The court of appeals and the Tax Court correctly held that petitioners' income from the reindeer enterprise was subject to federal taxation. These courts applied the settled

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[2]The court also rejected petitioners' other arguments (not renewed here) that (1) an exemption was provided by the contracts conveying the reindeer herd to petitioners from the government; (2) special weight should be accorded a Department of the Interior Solicitor's Opinion that this income was tax-exempt; and (3) the Commissioner had conceded this issue in Rev. Rul. 67-284, 1967-2 C.B. 55. Pet. App. 35-37.

principle that Indians are subject to taxation on the same basis as other taxpayers unless they are expressly exempted from such taxation by statute or treaty. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 155-156 (1973); *Superintendent* v. *Commissioner*, 295 U.S. 418, 420-421 (1935); *Choteau* v. *Burnet*, 283 U.S. 691, 694, 696 (1931).

Neither the Reindeer Industry Act nor any other treaty or statute expressly exempts from taxation the income derived by Alaskan natives from the operation of reindeer herds. Indeed, petitioners do not argue to the contrary. Instead, they contend that the Reindeer Industry Act creates an exemption by implication (Pet. 18-36), drawing an analogy to this Court's construction of the General Allotment Act of 1887, 25 U.S.C. 331 *et seq.*, in *Squire* v. *Capoeman*, 351 U.S. 1 (1956). The court below properly rejected that argument.

The General Allotment Act guaranteed that lands allotted to the Indians and held in trust by the United States would eventually be delivered to them free and clear of all charges and incumbrances. 25 U.S.C. 348. The Act further provided that once the land was conveyed, "all restrictions as to sale, incumbrance, *or taxation* of said land shall be removed". 25 U.S.C. 349 (emphasis added). This Court, relying on the specific statutory language providing that the trust lands would be held free from encumbrances until conveyed, concluded that Congress intended to exempt allotted land from all taxes until such time as the fee interest would be transferred to the allottee. *Squire*, 351 U.S. at 7-8.[3]

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[3]Contrary to petitioners' suggestions (Pet. 11-18), it is not the "trust relationship" between the United States and the Indian Tribes or the "trust" status of the allotted land that creates the tax exemption; rather it is the language of the General Allotment Act, which expresses a congressional intent that allotted land be tax exempt. See *Squire*, 351 U.S. at 7-8. Thus, the fact that the United States shows special concern

In contrast, the Reindeer Industry Act contains no language comparable to the free-of-incumbrance language found in the General Allotment Act. Nor is there any other indication that Congress intended that profits from reindeer herding operations conducted pursuant to the Act would be tax-exempt. Moreover, the two Acts evince entirely different legislative purposes. The General Allotment Act was intended to benefit the individual Indian allottees by preserving their interests in the allotted land while preparing them for assimilation into American culture. See generally *F. Cohen, Handbook of Federal Indian Law* 127-143 (1982 ed.). As the Court noted in *Squire*, taxation would diminish the interests that Congress intended to preserve. 351 U.S. at 9-10. In contrast, the Reindeer Industry Act was intended to provide a continuing food source to Eskimos of northwestern Alaska through the establishment of a native-operated reindeer industry. See 25 U.S.C. 500; see also H.R. Rep. 1188, 75th Cong., 1st Sess. 3 (1937); S. Rep. 474, 75th Cong., 1st Sess. 4 (1937). As the court of appeals recognized (Pet. App. 34), federal taxation of profits derived from successful reindeer enterprises in no way undermines the purpose of the Act.[4]

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for Alaskan natives, see 25 U.S.C. 500, or might hold reindeer in trust for them, see 25 U.S.C. 500g, does not create a tax exemption; rather, one must examine the language of the Reindeer Industry Act for an expression of intent to grant a tax exemption.

[4]Petitioners err in relying (Pet. 26, 28) upon *Stevens* v. *Commissioner*, 452 F.2d 741 (9th Cir. 1971), *Big Eagle* v. *United States*, 300 F.2d 765 (Ct. Cl. 1962), and *Kirschling* v. *United States*, 746 F.2d 512 (9th Cir. 1984). Those cases deal with taxation of Indian income from lands allotted under statutes similar to the General Allotment Act, and are thus controlled by *Squire*. In contrast, the courts have consistently declined to interpret *Squire* as exempting from taxation income that is not directly derived from allotted land. See, *e.g.*, *Hoptowit* v. *Commissioner*, 709 F.2d 564 (9th Cir. 1983); *United States* v. *Anderson*, 625 F.2d 910 (9th Cir. 1980), cert. denied, 450 U.S. 920 (1981); *Jourdain* v. *Commissioner*, 617 F.2d 507 (8th Cir. 1980), cert. denied, 449 U.S. 839

b. There is no merit to petitioners' suggestion (Pet. 15-17) that *Squire* invests Indians with an implied exemption from federal income taxation. As noted above, this Court has long held, quite to the contrary, that Indians are subject to tax on the same basis as other taxpayers unless exempted by the provisions of a treaty or statute. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 155-156; *Superintendent* v. *Commissioner*, 295 U.S. at 419-421; *Heiner* v. *Colonial Trust Co.*, 275 U.S. 232, 234-235 (1927). As the Court stated in *Choteau* v. *Burnet*, 283 U.S. at 696, "[t]he intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter." The Court did not purport to overturn that settled principle in *Squire* v. *Capoeman, supra*. Indeed it expressly approved that rule (351 U.S. at 6), concluding, as discussed above, that the provisions of the General Allotment Act did demonstrate a congressional intent to exempt the income in question from tax.[5] Unlike the General Allotment Act, neither the Reindeer Industry Act nor any other applicable statute or treaty suggests that Congress intended to create an exemption for income

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(1980); *Critzer* v. *United States*, 597 F.2d 708 (Ct. Cl.), cert. denied, 444 U.S. 920 (1979); *Fry* v. *United States*, 557 F.2d 646 (9th Cir. 1977), cert. denied, 434 U.S. 1011 (1978); *Holt* v. *Commissioner*, 364 F.2d 38 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967); *Commissioner* v. *Walker*, 326 F.2d 261 (9th Cir. 1964); *Beams* v. *United States*, 294 F. Supp. 1218 (E.D. Okla. 1968), aff'd per curiam, 417 F.2d 197 (10th Cir. 1969).

[5]Petitioners mistakenly cite (Pet. 15-16) *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973), and *Carpenter* v. *Shaw*, 280 U.S. 363 (1930), as instances where the express statutory exemption requirement has been rejected by this Court. *Carpenter* and *McClanahan* both involved treaties that the Court held were intended to provide exemption from state taxation.

derived from Alaskan natives' reindeer enterprises. Accordingly, the courts below properly held that petitioners' income was subject to federal tax.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

JULY 1985

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[6]Despite petitioners' representations (Pet. 11) that income from operating a reindeer herd has historically been exempt from tax, nothing in the record indicates how the instant petitioners or other reindeer herd owners have been taxed in prior years. The record is likewise bereft of any showing as to whether, if such income had not been taxed previously, the Internal Revenue Service had affirmatively agreed with the position taken by the petitioners or whether it had simply failed, for whatever reason, to discover or object to the nonreporting of this income. As we have noted (note 2, *supra*), petitioners no longer rely on any published ruling by the Commissioner.

Supreme Court, U.S.
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No. 84-1772

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1985

HARRY H. and ALICE G. KARMUN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' REPLY BRIEF

STEVEN C. MOORE
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Attorney for Petitioners
Harry H. and Alice G. Karmun

August 2, 1985

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I. THE RECENT DECISIONS OF THIS COURT IN MONTANA v. BLACKFEET TRIBE OF INDIANS AND COUNTY OF ONEIDA v. ONEIDA INDIAN NATION REAFFIRM THE IMPORTANCE OF GRANTING REVIEW OF THE NINTH CIRCUIT'S DECISION IN THE INSTANT CASE.

The instant case represents a classic conflict between two bodies of law, in this instance federal Indian law and federal income tax law. Traditional notions of tax law require that exemptions from taxation cannot be granted by implication but must be clearly expressed. In contrast, a well established principle of Indian law is that statutes affecting Indians are to be liberally construed to the benefit of the Indian. Petitioners submit that under the circumstances raised by the present case this Court must follow the holding in the seminal federal Indian taxation case of Squire v. Capoeman, 351 U.S. 1 (1956) and reconcile the conflict by granting them an exemption from federal income tax.

Succinctly stated, the Court in Squire held that income directly derived from an Indian's own trust property is exempt from federal taxation during the period of the trust. Because of the nature of the property and related income in this case -- namely income directly derived from reindeer held in trust under express provisions of the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500 et seq. -- Squire is the only decision of this Court directly on point and must therefore control the result. Other decisions cited by Respondent involve extensions beyond the Squire rule and are thus distinguishable.[1/]

[1/] See discussion in Section II, infra. Note also that the cases cited by Respondent in the latter half of n. 4 (Br. in Op. p. 4) are examples of extensions beyond the basic Squire rule: either someone other than the primary trust beneficiary sought the tax exemption or the income was not directly derived from the beneficiary's trust property.

Two recent decisions from this Court's last term provide additional strength to the Squire Court's reconciliation of conflicting principles of federal Indian and tax law in favor of the Indian in "directly derived" income cases. First is the decision in County of Oneida v. Oneida Indian Nation, ___ U.S. ___, 105 S. Ct. 1245 (1985), where this Court announced that the "canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." 105 S. Ct. at 1258. Second is the case of Montana v. Blackfeet Tribe of Indians, ___ U.S. ___, 105 S. Ct. 2399 (1985), where, after quoting the above passage from Oneida, this Court applied the canons of statutory construction to defeat the imposition of a state royalty tax to income earned under leases entered into pursuant to the

provisions of a 1938 federal law on the ground that the law did not expressly authorize the imposition of taxation.

> Indeed, the Court has held that although tax exemptions are to be construed narrowly, in "the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal. . . ." Choate v. Trapp, 224 U.S. at 675.

Montana v. Blackfeet Tribe of Indians, supra, 105 S. Ct. at 2404, n. 4.

Oneida and Blackfeet are important to the present case for several reasons. First, because the reindeer owned by Petitioners are the subject of an express federal trusteeship the canons of construction rooted in that unique trust relationship must be applied to reconcile the conflict between federal Indian and tax law. Oneida, supra. And second, because this is an Indian tax case, the Reindeer Industry Act must be liberally

construed to confer an exemption from federal taxation for income directly derived from the sale of reindeer and reindeer products. Blackfeet, supra. Thus, the analytical approach used by the Court in Squire to imply an exemption has been soundly reaffirmed by this Court in Oneida and Blackfeet, and should be the basis for conferring an exemption here.

II. RESPONDENT'S EFFORT TO NARROWLY INTERPRET SQUIRE MUST FAIL.

Respondent misreads the decision in Squire in two key respects. First, Respondent would have the Court believe that the Squire Court adopted the "settled principle" from Choteau v. Burnett, 283 U.S. 691, 696 (1931) that the "intent to exclude [from taxation] must be definitely expressed." (Br. in Op. p. 5.) Quite the contrary is in fact the case. The Court in Squire expressly distinguished Choteau on the ground that

the Indian in question there was competent and had unrestricted control over his land. Squire, supra, 351 U.S. at 9, n. 19. With respect to such a case the Squire Court clearly said that "in the ordinary affairs of life . . . [Indians] are subject to the payment of income taxes as are other citizens." Id. at 6.[2/]

[2/]Respondents' reliance on Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); and Superintendent v. Commissioner, 295 U.S. 418 (1935) is also misplaced. (Br. in Op. at pp. 3 and 5.) Neither are "directly derived" trust income cases: the Squire Court distinguished Superintendent because the income there was "reinvestment" income. Squire, supra, 351 U.S. at 9. Mescalero is easily distinguishable: the Indian property there, though tribally owned, was outside the boundaries of the Mescalero Reservation and not held in federal trust or restricted status. Mescalero, supra, 411 U.S. at 145-6. Thus in the view of the Court in Squire these would be nothing more than ordinary tax cases.

The fundamental distinguishing factor which makes Squire so important is that in cases involving trust property and income derived directly therefrom the rules of the game are different: an affirmative showing must be made that Congress intended to tax the primary trust beneficiary. Id. at 8.

Second, Respondent attempts to limit the application of Squire on the basis that it applies only to income directly derived from allotted land. (Br. in Op. pp. 3-4.) Respondent, however, can cite to no case which establishes that principle nor can any argument be found in Respondent's brief in opposition distinguishing between the trust established pursuant to the General Allotment Act, 25 U.S.C. §§ 331 et seq., and that established by the Reindeer Industry Act. Again, as this Court in

Oneida and Blackfeet make clear: the canons of construction have their origin in the trust and those canons compel a different result in trust based Indian income tax cases from cases involving the taxation of ordinary citizens.

III. CONCLUSION

Alaskan reindeer may indeed be unique Indian trust property but that factor, standing alone, cannot legitimately be the basis for the Ninth Circuit's departure from the principles established in Squire in denying the Karmuns an exemption from federal income taxation. Trust reindeer have all the classic incidents of Indian trust property and, during the period of the trust, should be treated accordingly for tax purposes. The recent decisions of this Court in Blackfeet and Oneida only serve to confirm the need to correct the Ninth

Circuit's departure from Squire and apply the correct rules of construction to reconcile the conflict inherent in federal Indian and tax law cases in favor of the Indian when directly derived trust income is at issue.

Respectfully submitted,

STEVEN C. MOORE
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Petitioners